access in all situations and must provide access to the features of the switch that enable it to record and bill for such access. Until Ameritech does so, it cannot satisfy the unbundled switching element of the checklist.[44]

Ironically, after spending so much time arguing that UNEs count as "facilities" because the purchaser obtains the right to control them, Ameritech refuses to give that control to purchasers of switching. According to Ameritech, carriers using unbundled network elements and their own facilities "are able to create new and different services or service packages" as a result of their control.[45] Control of the switching capability, Ameritech contends "is the *primary source* of the competitive advantage in the network."[46] Yet Ameritech steadfastly refuses to provide purchasers of unbundled switching with access to all of that capability, and with the ability to use it to provide both originating and terminating access to IXCs. Unless and until Ameritech relinquishes this control, it is not in compliance with the checklist's unbundling requirement.

In addition, Ameritech does not allow purchasers of its ULS element to use the same interoffice transport facilities that Ameritech uses when it is the local exchange carrier. Ameritech claims, for example, that the local switching element includes the switches'

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[44] Neither of the two "combination UNEs" Ameritech describes satisfy the switching element either. The "Network Platform-UNE" element (Kocher Aff. ¶ 66) is simply a combination of unbundled local switching and unbundled local transport, both as are defined by Ameritech *(Id.)*, and thus it suffers from the same defects as each individual element described in the text. The "Network Combination-Common Transport Service" (Kocher ¶¶ 67-69) is only a "technical trial" at this time *(Id. ¶ 69)* and, in any event, combines Ameritech's local transport *service*, at its tariffed rates, not common transport as a network element.

[45] Ameritech Brief at 13.

[46] *Id.* at n.10 (emphasis added).

capability to act on routing instructions, but not access to the routing instructions themselves.[47] Not only does this fail to satisfy Ameritech's obligation to provide unbundled transport (as is explained below), but it also renders Ameritech's provisioning of local switching to be unlawfully discriminatory. Ameritech allows itself to combine local switching with existing trunks it already uses for interoffice transport, but requires its competitors to install separate dedicated trunks for the same purpose.

2. Ameritech Refuses to Provide Common Interoffice Transport as Mandated by the Act

Ameritech offers only two types of interoffice transport facilities as unbundled network elements: a dedicated transport facility and a "shared" transport element.[48] Despite Ameritech's terminology, however, both options are in fact dedicated transport. What Ameritech refers to as "shared" transport is in fact a dedicated interoffice trunk used by a group of purchasers of "shared" transport, which is charged in proportion to the dedicated facility charge.[49] The only difference between this and what Ameritech calls dedicated transport is that the "dedicated" option is reserved for the exclusive use of the single purchaser, while "shared" transport is reserved for the use of a small number of other purchasers as well. In both instances, an entity seeking transport as an unbundled network element must pay for a trunk group separate from what Ameritech uses.

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[47] Supplemental Rebuttal Testimony of David H. Gebhardt at 6-7, ICC Docket No. 96-0404 (filed May 2, 1997) (attached as Vol 4, pp. AM-4-006678 to 79 of Ameritech's application).

[48] Edwards Aff., ¶ 91.

[49] *Id.*

Thus Ameritech does not offer "common" transport between end offices. Common transport is access to Ameritech's existing interoffice trunks on a usage basis. Unlike Ameritech's "shared" transport proposal, common transport allows requesting carriers to share the facility not only with other purchasers of unbundled network elements, but also with Ameritech.

In its *Interconnection Order*, the Commission specifically required ILECs to "provide interoffice transmission facilities on an unbundled basis to requesting carriers."[50] Unbundled transmission includes access both to shared facilities and to dedicated facilities, including the facilities that Ameritech uses to provide service to its own subscribers.[51] This includes "access to shared interoffice facilities *and* dedicated interoffice facilities between the above-identified points in incumbent LECs' networks, including facilities between incumbent LECs' end offices, new entrant's switching offices and LEC switching offices, and DCSs."[52] Common end office transport involves transport "between incumbent LECs' end offices" using facilities used by the incumbent LEC to provide a telecommunications service. As such, it must be offered on an unbundled basis to requesting carriers.

In effect, Ameritech is attempting to deny access to its existing facilities by requiring competitors to pay for separate transmission trunks, even though such trunks are not necessary. By requiring the installation of redundant dedicated trunk groups, Ameritech's interoffice transport offering raises the cost of entry for competitors and leads to inefficient

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[50] *Interconnection Order* at ¶ 439.

[51] *Id.* ¶ 440.

[52] *Id.* ¶ 447 (emphasis added).

utilization of interoffice facilities. New entrants, particularly smaller carriers, will not have sufficient traffic volumes to require a dedicated interoffice circuit. They require common transport, one that utilizes the economies of scale present in Ameritech's existing network.

Availability of a common transport element also will allow a competitor to combine the transport and switching elements most efficiently in a platform context. An efficient carrier will want to use the traffic routing capabilities it receives through unbundled local switching to direct traffic it receives to the most cost-effective trunk group. This almost always will be the trunk group that also is utilized by Ameritech for its own traffic transiting the switch. Moreover, if carriers must route their traffic to separate trunk groups, Ameritech's unbundled switching element must be programmed with the capability to selectively route traffic to multiple new trunk groups, putting pressure on the customized routing features of the software Ameritech currently uses in its local switches. It makes no sense to require this additional complication, which might prematurely exhaust the customized routing capabilities of LEC switches, when use of the preexisting routing tables to send traffic to a common interoffice transport trunk would be the most efficient option.

3. Ameritech's Operational Support Systems Are Deficient

The provision of nondiscriminatory access to OSS functions is a cornerstone to the competitive local entry contemplated by the 1996 Act. Cognizant of this, the Commission already has determined that ILECs must provide CLECs with at least the same quality of OSS that they provide to themselves.[53] Without such parity, local telephone competition

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[53] *Interconnection Order* at ¶ 523; 47 C.F.R. § 51.319(f).

cannot become a reality because CLECs will be unable to provide their customers with the same level of actual or perceived service quality that the ILECs provide (*i.e.*, prompt ordering and connection, billing, maintenance and repair). In spite of a January 1, 1997 deadline set by the Commission, Ameritech remains unable to demonstrate that it is providing parity of access to OSS. On this count alone, Ameritech's application should be denied.

With regard to Ameritech's performance in Michigan, CompTel asserts that, because Ameritech has failed to demonstrate that its OSS functions perform in commercial settings, the Commission cannot even begin to assess whether such provisioning is being done on a nondiscriminatory basis. Ameritech's brief is full of carefully crafted assertions intended to create the appearance of widespread OSS availability. However, none of these assertions can make up for Ameritech's failure to demonstrate that *all* of its OSS functions perform in Commercial settings. For example, Ameritech states that "all of [its OSS] interfaces are operationally ready to process data, and *many* of them are already doing so on a commercial basis."[54] Later, it claims that, "*[m]any* of the interface functions have also been subjected to successful carrier-to-carrier testing, and *a significant number* of them are in actual use."[55] Further, its chart describing the provision of OSS elements answers "Yes" to the heading "Carrier Tested/Actual Use," which in context appears to mean "Carrier Tested *or* Actual Use."[56] What Ameritech is trying to avoid saying by its use of such carefully crafted

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[54] Ameritech Brief at 24 (emphasis added).

[55] *Id.* at 25 (emphasis added).

[56] *Id.* at 23.

statements is clear: Ameritech is still working to deploy its OSS functions, and only some interfaces are actually available at this time. However, the statute requires Ameritech to *provide all* unbundled network elements (including OSS). Simply put, until Ameritech can make the assertion that its performance "is amply demonstrated by the results of internal testing, carrier-to-carrier testing *and* actual use of interfaces to date,"[57] Ameritech cannot even begin to make a plausible argument that has met its statutory obligation to provide OSS.

Moreover, for those OSS functions Ameritech actually is attempting to provide, there is substantial evidence that Ameritech's systems have failed miserably and to such an extent that Ameritech's claim of parity should be dismissed as being nothing short of delusional. The experiences of several carriers point to substantial deficiencies with electronic interfaces and timely record reporting and an overall lack of operational readiness.[58] Additional OSS barriers include Ameritech's failure to standardize and failure to adopt a measurement plan.[59] The Wisconsin Public Service Commission ("WPSC") and an Illinois Commerce Commission ("ICC") hearing examiner, recently made affirmative determinations that Ameritech's OSS functions were neither sufficiently tested nor operationally ready.[60]

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[57] *Id.* at 25.

[58] *See, e.g.*, LCI/CompTel Petition at 34-48 (citing OSS related difficulties and failures experienced by LCI, TCG, AT&T, MCI and Sprint); Connolly Aff. ¶ 5-9 (asserting that none of Ameritech's OSS interfaces have been shown by Ameritech to be operationally ready).

[59] LCI/CompTel Petition at 45-46.

[60] Staff Draft Findings of Fact, Conclusions of Law and Second Order Before the Wisconsin Public Service Commission, Docket No. 6720-T-120 (May 5, 1997); Hearing Examiner's Proposed Order Illinois Commerce Commission, Docket No. 96-0404 (Mar. 6, 1997).

Because Ameritech's OSS interfaces are provided on a regional basis,[61] CompTel asserts that the situation is no different in Michigan. In any event, Ameritech certainly has not met its burden to demonstrate that it is and that its OSS functions have been functions have been sufficiently tested and are operationally ready in Michigan.

In fact, Ameritech's arguments in its defense largely boil down to promises that it has fixed its widespread OSS problems, determinations that many problems are not actually problems at all, and conclusions that some problems are merely "bugs." CompTel submits that none of these arguments are even remotely compelling. For example, TCG Detroit has made repeated requests for operational electronic interfaces, yet none have been made available.[62] Moreover, Ameritech has not even offered a date when they would become available. Brooks Fiber, AT&T and MCI also have presented a host of problems with Ameritech's OSS interfaces.[63]

In its defense, Ameritech asserts that AT&T and other competitors "seek to hold Ameritech's OSS interfaces up to an impossibly high 'bug free' standard that no information technologies system or application could ever meet."[64] This statement merely underscores

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[61] Ameritech Michigan's Submission of Information in Response to Brooks Fiber, Attachment B at 14-15 (attached to Ameritech's application, Vol. 4, pp. AM-4-006647 to 48).

[62] LCI/CompTel Petition at 34.

[63] Response of Brooks Fiber, Michigan Public Service Commission, Docket No. U-11104 (Apr. 25, 1997) ("[n]o orders have been processed for Brooks over Ameritech's OSS"; "despite repeated requests for electronic billing, no OSS for billing has been implemented" "Ameritech's own evidence proves that the OSS it claims to have implemented is not in compliance with industry guidelines"); Connolly Aff. (AT&T); Response of MCI, Michigan Public Service Commission, Docket No. U-11104 (April. 25, 1997).

[64] Ameritech Brief at 27.

Ameritech's fundamental failure to understand the scope of what is required by the Act. The Act requires parity (*i.e.*, what is good for Ameritech is what will be good for its competitors) and nothing less. Despite claims that the WPSC and ICC decisions were based on records of dismal OSS progress that were either incomplete or out-of-date,[65] Ameritech has yet to solve numerous OSS problems, including (to name a few): (1) why "ordering results are not consistent, accurate or predictable", (2) why it cannot render timely electronic bills to competitors, (3) why it cannot seem to solve a recurring double-billing problem, and (4) why order rejection rates are so high.[66] Until Ameritech does so, and demonstrates operational readiness, Ameritech cannot satisfy the checklist requirement of providing all OSS functions.

Finally, CompTel asserts that Ameritech has not established a sufficiently comprehensive set of performance standards, nor supplied its own retail performance information, to permit the Commission to determine whether competitors receive these functions on a nondiscriminatory basis. In fact, not a single BOC has established appropriate performance and measurement standards that will enable the Commission to make the necessary assessment with regard to parity. Thus, CompTel urges the Commission to establish appropriate minimum performance and measurement standards for each OSS function, so that ILEC compliance with the Commission's OSS requirements can be readily demonstrated. CompTel further suggests that the Commission establish any related OSS

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[65] Notably, the Wisconsin and Illinois decisions were made *after* Ameritech filed its first application to the FCC for interLATA authority for Michigan, in which it, as here, claimed its OSS was "ready enough."

[66] Connolly Aff. at 5-9.

requirements (*e.g.*, appropriate beta testing to ensure operability and scaleability) that must be met by an ILEC in both the resale and unbundled environments, including the network platform. As CompTel and LCI petitioned the Commission in their joint Petition for Expedited Rulemaking, CompTel also submits, as it did in its joint petition for Expedited Rulemaking with LCI, that the Commission should model these performance standards on the standards formulated by the Local Competition Users Group, as attached to that Petition at Appendices A and B.[67]

III. AMERITECH HAS NOT DEMONSTRATED COMPLIANCE WITH SECTION 271(C)(1)(A)

Section 271(c)(1) is intended to ensure that there is a "tangible affirmation" that satisfaction of the competitive checklist is producing local competition.[68] The checklist identifies a specific set of requirements that Congress believed was the minimum that would be necessary to create an environment conducive to local competition. Section 271(c)(1)(A), sometimes referred to as "Track A," provides a real-world, empirical test to determine whether the checklist works, that is, whether it is providing consumers with real choices among local service providers. As shown below, the limited local entry by Brooks Fiber is insufficient to demonstrate that Ameritech faces tangible, actual competition for business and residential customers throughout Michigan.

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[67] LCI/CompTel Petition at 88 and Appendices A and B.

[68] H.R. Rep. No. 104-204 at 76-77 (the actual competition test "is the integral requirement of the checklist [in the House version of the bill], in that it is the tangible affirmation that the local exchange is indeed open to competition"); *see* H.R. Conf. Rep. No. 104-458 at 147 (Section 271(c)(1)(A) "came virtually verbatim from the House amendment").

A. Relevant Carriers for Purposes of Assessing Actual Competition Under Track A

Section 271(c)(1)(A) requires Ameritech to demonstrate that it is providing access to "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers."[69] These providers, in addition, must offer service either exclusively or predominantly over their own telephone exchange facilities.[70] Ameritech asserts that three carriers meet these requirements: Brooks Fiber, MFS, and TCG.[71] The Commission, therefore, must evaluate Ameritech's compliance with respect to these carriers only.

B. The Level of Competition Present in Michigan Does Not Satisfy the Actual Competition Test

The relevant portion of the "Track A" test requires, among other things, actual local competitive telephone exchange service to "residential and business" subscribers. Ameritech's application does not demonstrate that subscribers throughout the state of Michigan have an actual alternative provider, nor is the limited initial entry Ameritech recites sufficient to satisfy Track A's actual competition test.

Initially, the Commission must reject Ameritech's suggestion that MFS or TCG satisfy Track A at this time. Ameritech does not present any evidence that these two carriers

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[69] 47 U.S.C. § 271(c)(1)(A).

[70] *Id.*

[71] Ameritech Brief at 9.

actually serve residential customers.[72] Instead, it argues that these two carriers hold themselves out to provide service, which it apparently believes should be enough to presume service satisfying Track A.[73] No such presumption is permissible or appropriate. The mere authorization for local competitors to serve residential subscribers is not enough. Section 271(c)(1)(A) references interconnection agreements that have been approved and under which the applicant *"is providing"* access and interconnection to its network for use by a competing "provider" of telephone exchange service. Accordingly, the mere *potential* entry of MFS or TCG does not satisfy the Act's requirement that the entrant is serving residential and business subscribers. Similarly, the mere filing of a tariff is insufficient to prove actual competition. A tariff is evidence that MFS or TCG potentially will serve customers, not that they actually do so.

Thus, Ameritech's application rests on the assertion that Brooks Fiber satisfies the Track A test. While Brooks Fiber has entered the local exchange service market in a portion of Michigan and appears to be serving at least some residential subscribers, the Commission must evaluate this level of entry to determine whether it provides the tangible affirmation of actual competition that Congress intended. CompTel submits that it does not.

To satisfy the actual competition test, there must not only be actual service to a subscriber, but actual *competition* among providers. The record shows that at most Brooks Fiber provides service to only a small geographic area of Michigan and there is no evidence

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[72] *Id.* at 7 ("Ameritech Michigan is unaware whether any of the Michigan customers of MFS or TCG subscribe to residential service").

[73] *Id.*

that Brooks Fiber serves more than a *de minimis* number of subscribers in the state.[74] No residential customers have a choice of providers outside of the Grand Rapids municipal area, and no customers (residential or business) outside of Grand Rapids or Detroit have any competitive alternatives at all.[75] Brooks Fiber's service to a few residential or business customers in the Grand Rapids area cannot be considered as proof that Ameritech faces actual competition throughout the state of Michigan.

CompTel is aware that Congress did not adopt a specific market share or so-called "metrics" test for Section 271(c)(1)(A), and CompTel does not suggest one to the Commission. While no set market share or other numerical measure of competitiveness is mandated, there must be more than a trivial level of service in select portions of the state if the actual competition test is to have any meaning. It is important to remember that the authorization Ameritech seeks is state-wide. The Commission should not grant such an application unless it can determine that Ameritech faces actual, facilities-based competition throughout the state. This Ameritech has not done. Therefore, the Commission should find that Ameritech has not satisfied Section 271(c)(1)(A) at this time.

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[74] *See* Ameritech Brief at 9-10.

[75] Ameritech's brief, for example describes MFS and TCG facilities deployed in Detroit only. Ameritech Brief at 10-11.

IV. THE RELATIONSHIP BETWEEN AMERITECH'S "WHOLESALE" SUBSIDIARIES, AMERITECH MICHIGAN AND AMERITECH COMMUNICATIONS INC. IS SO UNCERTAIN THAT THE COMMISSION CANNOT MAKE A FINDING THAT AMERITECH COMPLIES WITH SECTION 272

The third finding the Commission must make is that Ameritech will carry out its interLATA authorization in accordance with Section 272 of the Act.[76] CompTel submits that the Commission is unable to make such a finding on the record before it because the Commission cannot determine whether Ameritech Michigan will use its affiliates, Ameritech Information Industry Services or Ameritech Long Distance Industry Services, to discriminate in favor of Ameritech's interLATA subsidiary (Ameritech Communications, Inc.). Ameritech's showing does not disclose the facilities or other services provided by these affiliates, except in the most cursory of terms, and does not provide the Commission with a record basis to conclude that those dealings comply with the Act.

From Ameritech's affidavits and other information, the following relationships are apparent. Ameritech Michigan jointly owns, along with the other Ameritech local exchange operating companies, Ameritech Services, Inc. ("Ameritech Services").[77] Ameritech services, in turn, is organized into two divisions: Ameritech Information Industry Services ("AIIS") and Ameritech Long Distance Industry Services ("ALDIS").[78] These two divisions "act on behalf of Ameritech Michigan with respect to the provision of wholesale

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[76] 47 U.S.C. § 271(d)(3)(B).

[77] Dun & Bradstreet, Inc., Business Record & Financial Abstract, "Ameritech Services, Inc."

[78] *Id.*; LaSchiazza Aff. ¶ 11.

telecommunications services and facilities" and are the "exclusive channels by which Ameritech provides interconnection, wholesale telecommunications services, unbundled network elements and exchange access services."[79] Indeed, AIIS is the entity with whom interconnection agreements are signed "on behalf of and as agent for" the appropriate Ameritech ILEC.[80] Moreover, a number of the affiants on behalf of Ameritech Michigan actually work for AIIS or ALDIS.[81]

The specific facilities and/or services that are purchased by Ameritech Michigan from these two divisions are not disclosed. The Commission does not know, for example, whether facilities used to provide local exchange services are owned by Ameritech Michigan or by Ameritech Services, Inc., nor does it know the extent to which Ameritech Communications, Inc. will receive, directly or through Ameritech Michigan, facilities or services from either of these two divisions. The Commission also does not know whether Ameritech Michigan has transferred to these affiliates, if at all, facilities used to provide local exchange services.[82] Other than the blanket assertion that Mr. LaSchiazza's affidavit "appl[ies]

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[79] LaSchiazza Aff. ¶ 11.

[80] *See, e.g.,* Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, by and between Ameritech Information Industry Services, a division of Ameritech Services, Inc. on behalf of and as agent for Ameritech Michigan and AT&T Communications of Michigan, Inc., appended as Tab 1.2 to Ameritech's application.

[81] *See, e.g.,* Kocher Aff., ¶ 1; Kriz Aff., ¶ 1; Edwards Aff., ¶ 1.

[82] *See, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, ¶ 309, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996) (a BOC may not transfer equipment, facilities or services to an affiliate to avoid its interconnection obligations).

equally to AIIS or ALDIS,"[83] the Commission does not have any information before it concerning the relationship between AIIS or ALDIS and Ameritech Communications.

Ameritech's relationship with yet another subsidiary, Ameritech Advanced Data Services, Inc. ("AADS"), illustrates why the Commission cannot accept Mr. LaSchiazza's statement standing alone.[84] AADS, through sister subsidiaries in each state, provides frame relay, asynchronous transfer mode, and internet services, along with customer premises equipment and other data services on a retail basis. AADS purchases the basic frame relay service needed to provide its retail service from Ameritech. Although AADS thus appears to be a reseller of Ameritech's frame relay services, it turns out that AADS, not Ameritech, actually owns all of the switches used by Ameritech to provide its basic frame relay service. Ameritech purchases frame relay switch functionality from AADS, at undisclosed and unregulated prices, and then uses that functionality to provide frame relay "service," which it sells back to AADS.

This convoluted corporate structure and service relationship did not develop by accident. In fact, relying on its purchase of switching functionality from AADS, Ameritech has claimed that it does not "own" facilities or equipment used to provide frame relay, and therefore does not have the ability to permit requesting telecommunications carriers to interconnect directly with the frame relay switches. In other words, by Ameritech's simple tactic of placing critical network equipment in an affiliate, it claims that it is powerless to

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[83] LaSchiazza Aff., ¶ 11.

[84] For support for the factual assertions contained in the following two paragraphs, *see, Final Brief of Intermedia Communications, Inc.*, Ohio PUC Case No. 97-285-TP-ARB (filed May 16, 1997).

comply with the interconnection obligations of Section 251. Moreover, because Ameritech purchases the critical switch functionality from its affiliate, the (unregulated) price its affiliate charges becomes Ameritech's "TELRIC" for providing the functionality to others. Again, the simple expedient of transferring equipment to an affiliate is used to evade the Act's requirements, this time its cost standard.

The point is not whether Ameritech is obligated to provide frame relay interconnection to competitors or the price it should charge. Rather, the Ameritech-AADS example illustrates how an affiliate may be used to evade the Act through a variety of self-dealing arrangements. If Ameritech has cooked up such schemes for its frame relay services, it is equally possible it has developed or implemented similar plans for interexchange services. ALDIS might own the underlying facilities used to provide exchange access, for example. Or AIIS might provide interoffice transmission services at a "wholesale" price (as set by it) to Ameritech Michigan or ACI. Without a better explanation of the roles of ALDIS and AIIS, the facilities and/or services they provide, and the ownership of switches and other network equipment, Ameritech has not met its burden of showing that it (and its various affiliates) will comply with Section 272.

V. GRANT OF AMERITECH'S APPLICATION WOULD NOT BE CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY

Before the Commission can authorize Ameritech to provide in-region interLATA services, the 1996 Act requires that it must find that Ameritech: (1) has fully implemented approved access and interconnection agreements with one or more facilities-based providers serving residential and business subscribers; (2) provides all fourteen items on the

competitive checklist; and (3) satisfies the competitive safeguard and nondiscrimination provisions of Section 272. Significantly, the Commission also must make a *separate and additional* determination that grant of Ameritech's application for interLATA entry would be consistent with the public interest, convenience, and necessity.[85] Thus, even if Ameritech were to meet Congress' first three requirements for interLATA entry, which it does not, the Commission could still find that Ameritech's application should be denied because its grant would not be consistent with the public interest. Because Ameritech does not face substantial competition in Michigan and has not made such competition possible, the Commission cannot find that it would be in the public interest to grant Ameritech's application at this time. Thus, in addition to its failure to meet the first three requirements for interLATA entry, Ameritech's application for entry into the interLATA market also fails to meet the statute's public interest test.

A. Congress' Incorporation of the Public Interest Test into Section 271 Confers Broad Authority on the Commission

The legislative history of Section 271(d)(3) shows that Congress considered an independent public interest requirement to be a critical component of the Commission's Section 271 review process. During the Senate's consideration of what became Section 271(d) of the 1996 Act,[86] Senator McCain proposed an amendment to the bill which would have deleted the public interest test and relied solely upon satisfaction of the checklist and

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[85] 47 U.S.C. § 271(d)(3).

[86] Section 271(d) was based upon the basic structure of the Senate version of the bill. H.R. Conf. Rep. No. 104-458, at 149.

separate affiliate requirements as prerequisites to BOC interLATA entry. Senator McCain's primary argument against the public interest test was that it gave the FCC "policymaking discretion" in addition to determining compliance with the other requirements enumerated by Congress.[87] The Senate rejected that amendment.[88]

In incorporating the public interest test into this section and in rejecting efforts to eliminate the public interest inquiry, it is clear that Congress intended for the Commission to use its expertise and traditionally broad and discretionary public interest authority to make a pragmatic, real world assessment of whether the statutory entry tracks and the competitive checklist proved adequate to open relevant local exchange and access markets to substantial competition.[89] Importantly, the statute requires that the Commission make this assessment in consultation with DOJ, which has similarly broad authority and expertise in antitrust matters. Thus, as a separate inquiry mandated by the statute, the public interest test gives the Commission discretion to deny an application *even if* the BOC has satisfied Track A, provides all items on the competitive checklist and meets the competitive safeguards of Section 272.

It is well settled that the "public interest" standard under the Communications Act is expansive and gives the Commission discretionary authority to consider a broad range of

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[87] *See, e.g.*, 141 Cong. Rec. S.7960 (daily ed. June 8, 1995) (arguing that the public interest standard "implies almost limitless policymaking authority to the FCC").

[88] *Id.* at S.7960-71.

[89] *See, e.g.*, 141 Cong. Rec. S.7970 (daily ed. June 8 1995) (statement of Sen. Kerry) ("I have one final test [the public interest test] that, by the way, has been litigated many, many times over the course of time. The Supreme Court has spoken many times on this issue . . . . This is an effort to make certain that in fact we do get competition at the local level.").

factors,[90] including competition and antitrust concerns.[91] It also is clear that Congress intended to incorporate this preexisting public interest standard into Section 271.[92] As used in Section 271(d)(3), the term "public interest" necessarily derives its "content and meaning" from "the purposes" for which it was "adopted."[93] In this case, it is clear that Congress' purpose was to vest in the Commission the discretionary power to deny BOC entry into the long distance market until the goal of substantial competition in the local exchange and access markets is realized.

Congress' intent in incorporating the public interest test into Section 271 is further underscored by the requirement that the Commission "give substantial weight to the Attorney General's evaluation."[94] Significantly, the statute requires DOJ to evaluate applications under "any standard the Attorney General considers appropriate."[95] Since DOJ is not limited to evaluating Ameritech's application based on its entry track, provision of checklist items or compliance with the safeguards of Section 272, the Commission, in turn, must have sufficient flexibility to weigh this recommendation in the context of its public interest

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[90] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1982); *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980).

[91] *See, e.g., United States v. FCC,* 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) ("competitive considerations are an important element of the public interest standard").

[92] Department of Justice Evaluation of SBC Communications - Oklahoma at 39-40, n. 48 (May 16, 1997); S. Rep. 104-23, at 43-44 (1995).

[93] *NAACP v. Fed. Power Comm'n*, 452 U.S. 662, 669 (1976).

[94] 47 U.S.C. § 271(d)(2)(A).

[95] *Id.*

assessment.[96] Congress surely intended the Commission's discretion under the public interest test to be robust enough to consider the types of issues DOJ might raise in its analysis.

B. The Public Interest Requires Denial of InterLATA Authority Until There No Longer Is a Need to Provide Ameritech with an Incentive to Open Local Markets to Competition

The Commission's review of the public interest must balance the competitive risks to the pace and scope of local exchange and exchange access competition against the meager benefits of Ameritech's entry into the already competitive interLATA market. In assessing these risks, the Commission must be mindful of the fact that the prospect of Section 271 authority is the *only* incentive Ameritech and the other BOCs have to open their networks to competition. Therefore, the Commission should insist that the local exchange and exchange access markets be open to competition for all industry participants, regardless of entry strategy, before granting the BOC authority to enter the interLATA market.

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[96] The President duly recognized the breadth of discretionary power vested in both the Commission and in DOJ in his statement issued upon signing the 1996 Act:

> the FCC must evaluate any application for entry into the long distance business in light of the public interest test, which gives the FCC discretion to consider a broad range of issues, such as the adequacy of interconnection agreements to permit vigorous competition . . . the FCC must accord "substantial weight" to the views of the Attorney General. This special legal standard, which I consider essential, ensures that the FCC and the courts will accord full weight to the special competition expertise of the Justice Department's Antitrust Division -- especially its expertise in making predictive judgments about the effect that entry by a Bell company into long distance may have on competition in local and long distance markets.

Statement by President William J. Clinton upon signing S.652, 1996 U.S. Code Cong. & Admin. News 228-1 (Feb. 8, 1996).

CompTel submits that the public interest, convenience and necessity standard will be met only when the congressionally recognized need to provide an incentive for BOCs to open local exchange markets has subsided. This need to provide the BOCs with an incentive will subside only when a BOC has eliminated barriers to entry and furnishes all checklist items and implements all interconnection agreements in a way that results in the presence of substantial competition from not only facilities-based providers, but also from resellers and "platform providers" making use of unbundled network elements. Until Michigan consumers have these choices, the Commission, via its public interest assessment, must use the discretionary power vested in it by Congress to ensure that the carefully crafted incentive built into Section 271 is kept in place.

At this time, only a *de minimis* number of Michigan consumers have any choice in local exchange and access providers. Despite the number of lines Ameritech claims competitors soon will be able to reach, Ameritech's failure to provide OSS, switching and common transport to competing providers severely curbs their ability to make expansive service offerings.

Thus, Ameritech retains control of approximately 99 percent of all access lines in Michigan and competitors, including facilities-based providers and resellers, find that they cannot obtain elements, services and support systems to effectively provide competitive service. In fact, conditions are such that there is no evidence that any competitor has made progress using the platform method of entry. That this is the case in spite of the fact that the Michigan legislature and the MPSC began to pave the road to local competition even before passage of the 1996 Act, and regardless of Ameritech's execution of numerous

interconnection and resale agreements, leads to one simple conclusion: substantial competition has not developed in Michigan because Ameritech has not taken the necessary steps to ensure that it is possible.

C. Ameritech's Public Interest Argument Runs Counter to the Congressional Intent Underlying Section 271

Ameritech's own discussion of the statute's public interest standard largely misses the mark. In evaluating whether grant of Ameritech's application is consistent with the public interest, the Commission must carefully weigh the alleged competitive benefits of Ameritech's entry into the interLATA market against the anticompetitive risks posed by such entry. Ameritech's entry into the interLATA market likely would produce only marginal benefits because that market already is "robustly competitive."[97] By contrast, there has been little opportunity for competition to develop in the local exchange and exchange access markets and Ameritech still has the incentive and ability to exercise its monopoly power.

Ameritech's focus on the benefits it may (or may not) bring to the interLATA market ignores the fact that Congress, through its passage of Section 271, expressed a willingness to delay entry of the BOCs as additional interLATA competitors in favor of providing the BOCs with an attractive incentive to ensure that local exchange markets were irreversibly open to competition. As demonstrated above, Ameritech has not taken the necessary actions to make this happen. In fact, many examples can be cited where Ameritech has taken affirmative steps to thwart competitive entry. No argument about the benefits consumers will reap from

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[97] *AT&T Non-Dominance Order*, ¶ 26.

Ameritech's entry into long distance, no matter how incredulous,[98] can overcome Congress' judgment, as expressed through its decision to withhold BOC interLATA authority as a quid-pro-quo for opening the local exchange to competition, that consumers will benefit *more* from the breakdown of local monopolies and the development of substantial competition in the local exchange and access markets.

In any event, many of the arguments raised by Ameritech in favor of its entry into the long distance market underscore the need to ensure that local markets are substantially competitive first. For example, Ameritech characterizes the long distance market as a "tight oligopoly"[67] while the Commission characterizes it as "robustly competitive."[68] Irrespective of who has it right (and it is not Ameritech), the continuing strength of

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[98] Professor MacAvoy's prediction of a consumer welfare benefit of $5.5 billion from Ameritech's entry into the Michigan long distance market proves little more than Ameritech has spent an amazing amount of money on the preparation of its application.

[67] Ameritech Brief at 64-65.

[68] In 1995, when the Commission reclassified AT&T as a non-dominant carrier it concluded that "most major segments of the interexchange market are subject to substantial competition today, and the vast majority of interexchange services and transactions are subject to substantial competition". *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3288, at ¶ 26 (rel. Oct. 23, 1995). On several occasions since passage of the 1996 Act, the Commission has reaffirmed its conclusion that the market for interLATA telecommunications services is "substantially competitive". For example, the Commission recently exercised its statutory forbearance authority for the first time to detariff virtually all interLATA services. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order FCC 96-424 (rel. Oct. 31, 1996). In that order, the Commission concluded that due to the high degree of competition in the interLATA market, government regulation of carrier rates and practices was not necessary to ensure just and reasonable rates or to protect consumers. In light of these conclusions, Ameritech's assertions as to the benefits consumers will reap as a result of its entry into the interLATA market appear highly suspect. Rather, it would appear reasonable to conclude that the addition of Ameritech as a competitor in that "robustly competitive" market will produce, at best, only marginal benefits.

Ameritech's "monopoly" strangle hold over the local exchange and access markets, as compared to the status of competition in the interLATA market, certainly reaffirms that Congress reached the right conclusion when it decided to prioritize local competition over additional interLATA competition via BOC entry, as it did in Section 271.[69] In short, Congress decided to place a priority on establishing substantial competition in local markets and consciously delayed BOC entry into long distance in order to ensure that this goal was met. Despite Ameritech's assertions, it is *not* in the public interest to undermine the statutory scheme by reversing the ordering of congressional priorities.

Ameritech's reliance on SNET's experience in Connecticut also underscores the fact that more needs to be done to open local markets to competition before the BOCs are allowed entry into long distance. Ameritech states that "SNET's aggressive entry [into the long distance] market through the provision of 'one stop shopping' for telecommunications services enabled SNET to capture 12% of AT&T's Connecticut revenue . . . ."[70] However, what Ameritech does not state is that the ease with which SNET entered the long distance market and the fact that SNET has monopoly control of the local exchange and access markets in Connecticut played significantly into SNET's seamless and aggressive entry into the long distance market in that state. One can be certain that SNET had little or no

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[69] If Professor MacAvoy could calculate a $5.5 billion consumer welfare benefit from Ameritech's entry into the long distance market, Ameritech Brief at 68, one could only speculate that the federal budget could be balanced with the figure he could come up with for the consumer welfare benefit resulting from substantial competition in the local exchange and access markets.

[70] Ameritech Brief at 68. Interestingly, Ameritech does not state how much consumers benefitted from the chunk of revenues that was captured from its arch-rival, AT&T, in Connecticut.

difficulty with the interfaces and support systems supplied by its wholesale long distance provider, Sprint. (If it had, you can be sure that SNET would have turned to any one of a number of other long distance wholesalers eager for its business.)

CompTel asserts that the lesson to be learned from SNET's entry into the Connecticut long distance market is not so much that incumbent monopolists are likely to take a big bite out of AT&T's revenues and market share, but rather that the ease with which competitive entry into the long distance market is achieved ought to be replicated at the local level. The fact that the Commission, along with Judge Greene, oversaw the transition of the long distance market from one of monopoly control to one in which new competitors can enter and capture a significant customer base virtually overnight underscores the public interest mandate that the Commission has to repeat this success in local markets.

D. The Risks Posed By Ameritech's Entry Into the InterLATA Market at This Time Are Great

Ameritech has monopoly power in the local exchange market.[71] Facilities-based competition in the local exchange marketplace has proven to be, and will continue to be, a slow and uneven process under the interconnection provisions of Section 251(c) of the 1996 Act. Granting Ameritech Section 271 authority now will only further impede the development of local competition. The prospect of interLATA authority under Section 271 is the only incentive for Ameritech and the other BOCs to open up their local monopoly networks to competition. Approving the Ameritech application when the local market is not

[71] Ameritech controls over approximately 99 percent of the access lines in Michigan. This is monopoly power by any conceivable antitrust definition.